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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91225722
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

STEVE JACKSON GAMES INCORPORATED  
Opposer,

v.

INXILE ENTERTAINMENT, INC.  
Applicant.

Opposition No. 91225722  
Serial No. 86/702,458

**OPPOSER'S REPLY BRIEF**

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### III. INTRODUCTION

Applicant, through its trial brief, seeks to persuade the Board that its proposed use and registration of AUTODUEL for a post-apocalyptic vehicular combat video game would not create a likelihood of confusion with Opposer's long-standing use of AUTODUEL for post-apocalyptic vehicular combat tabletop games and supplements, where Opposer also previously licensed the same mark for a post-apocalyptic vehicular combat video game. Applicant focuses on Opposer's past inattention to trademark registration maintenance, misrepresents uncontested facts in the record, renders Opposer's AUTODUEL mark as "autoduel", and attempts to dissect Opposer's long line of AUTODUEL-branded products and shared universe as if they are entirely unrelated to each other.

Once you set aside Applicant's gamesmanship, the case is simple. Opposer's priority is established by the evidence of record of Opposer's use of the AUTODUEL mark for over 35 years. The similarity between the parties' respective marks (both AUTODUEL) marks and respective goods (both post-apocalyptic vehicular combat games) is sufficient to establish a likelihood of confusion. Everything else in the record, from the surfeit of actual confusion (despite no use of Applicant's mark) to Applicant's stated desire to base its proposed video game on Opposer's prior AUTODUEL game (and thus benefit from the goodwill associated with Opposer's long-standing mark), is just a plus factor here. And whether or not the Board deems Applicant's scant documentary evidence long after filing its application as sufficient to establish a *bona fide* intention to use the AUTODUEL mark, it is clear that Applicant's intentions were dominated by a desire to take a free ride on the goodwill of Opposer's AUTODUEL video game, which although it has not been available for a number of years, is an integral part of the history and DNA of Opposer's AUTODUEL Mark and products dating back to 1982 and continuing to this day. The Board should sustain Opposer's opposition.

#### IV. ARGUMENT

##### A. Applicant's Arguments on Likelihood of Confusion Rely on Misdirection and Omission.

###### 1. *Opposer's AUTODUEL Mark is Distinctive.*

In its trial brief, Applicant asserts that the mark Opposer owns, and that Applicant seeks to register, AUTODUEL, is descriptive. 42 TTABVUE 19-20. Applicant is wrong<sup>1</sup>—the Board has already acknowledged Opposer's trademark rights dating back to 2005 (18 TTABVUE 3), and the record before the Board establishes that the mark is inherently distinctive and has actual distinctiveness in the marketplace as a result of Opposer's exclusive and continuous use of the AUTODUEL Mark in connection with a variety of tabletop games and game supplements for over 35 years. *See* Opposer's Trial Brief, 40 TTABVUE 8-13, 20-21.

To recap the history of AUTODUEL filings with the USPTO, Opposer's original AUTODUEL! registration was issued on the Principal Register (25 TTABVUE 18 (Ex. 1)), neither of Opposer's subsequent applications to register AUTODUEL were refused as merely descriptive (29 TTABVUE 25 (Ex. 47), 10 (Ex. 46)), and Applicant's AUTODUEL application that is the subject of this proceeding was not refused as merely descriptive. Notably, Applicant was unable to introduce into the record any dictionary definition or other evidence to show that "Autoduel" is a word in the English language. Applicant has also not introduced any evidence of use of "Autoduel" by any third parties in connection with games of any kind, despite Mr. Fargo's testimony that "post-apocalyptic computer game(s)" with "battling vehicles" are a "fairly popular genre." 37 TTABVUE 4 (¶10). Mr. Reed's testimony and documents establish that consumers recognize that AUTODUEL is a brand in the real world, and that in the in-game universe shared by Opposer's CAR WARS and AUTODUEL brands, participants refer to "Autoduelling." 39 TTABVUE 19:16-19:22. Opposer's mentions of AUTODUEL in referring to

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<sup>1</sup> If the Board feels compelled to hold that AUTODUEL is merely descriptive when used in connection with vehicular combat games, then it should *sua sponte* sustain this opposition on the additional ground that Applicant's mark is merely descriptive and has not acquired distinctiveness.

Opposer's products on one hand, and to activities within the game universe on the other, do not render the term non-distinctive, just as common usage of the term "Googling" does not render the GOOGLE mark non-distinctive. If a consumers happen to refer to "Autodueling" while playing Opposer's games, they clearly recognize the source of Opposer's AUTODUEL products—after all it is displayed on the box and they chose to play that game.

Opposer's evidence of long-standing use and promotion of the mark AUTODUEL in connection with Opposer's games and game supplements, and actual sales of AUTODUEL-branded products for over 35 years, are not the only types of evidence of record that the AUTODUEL Mark does in fact distinguish Opposer and its goods in the market. The extensive evidence of actual confusion in the record (summarized in Opposer's Trial Brief, 40 TTABVUE 17-18, 25-27), further establishes that consumers recognize and identify Opposer as the source for AUTODUEL-branded products. *See Tools USA and Equip. Co. v. Champ Frame Straightening Equip. Inc.*, 87 F.3d 654, 39 U.S.P.Q.2d 1355, 1360 (4th Cir. 1996) ("Evidence offered as to actual customer confusion, although also probative of likelihood of confusion, certainly tends to show [secondary meaning]."). *See also* J. Thomas McCarthy, 2 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 15:37 (5th ed.) ("Evidence of actual confusion is strong evidence of secondary meaning."). Applicant's argument that AUTODUEL is descriptive may jeopardize its own application, but cannot affect Opposer's rights in the AUTODUEL Mark.

## *2. Opposer's Mark Is Used In Connection with Tabletop Games and Game Supplements*

At the summary judgment stage, Applicant mischaracterized Opposer's AUTODUEL-branded products as "magazines" and "back issues." While Applicant still uses these terms, it does acknowledge that the Board found that Opposer has continuing rights in the AUTODUEL mark by focusing on the term "game supplements" to the exclusion of the term "game." The strategy here appears to be that by calling Opposer's AUTODUEL products "game supplements," Opposer's goods are portrayed as one step further away from Applicant's proposed AUTODUEL video games. But as with many things in Applicant's brief, this is a mischaracterization.

For the sake of clarity, GURPS® Autoduel™ is a game in itself. This product is a role-playing “worldbook” that provides gamers with the rules, background, setting, and details necessary to conduct role-playing games using the underlying GURPS system and set in the post-apocalyptic setting of Car Wars. 25 TTABVUE 3 (¶ 7). Opposer does sell a number of AUTODUEL-branded game supplements. Mr. Reed’s testimony establishes that some of its products, such as Autoduel™ Quarterly and the Autoduel™ America map are supplements for both Car Wars and GURPS Autoduel. *Id.* In other words a customer can purchase GURPS Autoduel, set up a scenario, and role-play through a campaign with friends for days or weeks before finishing a play-through. Later, that customer can then set up and play through another game with an expanded catalog of scenarios, locations, characters, vehicles, and game aids by supplementing with other AUTODUEL-branded products such as the AADA™ Road Atlases, Autoduel™ America map, and Autoduel™ Quarterly supplement. *See id.* at ¶¶ 6-7, 17 for descriptions of the nature and interrelatedness of Opposer’s AUTODUEL-branded products. Despite Applicant’s mischaracterizations, Opposer has established use of its AUTODUEL Mark in connection with both games and game supplements.

3. *Applicant Simply Ignores Opposer’s Evidence Regarding Similarity of the Goods.*

Instead of providing evidence that the goods at issue in this case are not similar, Applicant reiterates its fruitless arguments about Opposer’s failure to maintain its registrations and applications for its AUTODUEL Mark and relies on a series of cases that are wholly inapplicable here. First, the *Justin Vineyards & Winery* case deals with the issue of the relatedness of beer and wine, a thorny issue with a long history in the TTAB. *Justin Vineyards & Winery LLC v. Crooked Stave, LLC*, Opp. No. 91229132, at 12-13 (TTAB June 26, 2018) (non-precedential). Similarly, the *Iron Hill Brewery* case deals with a similar issue of the relatedness of restaurant services and food/beverage products, which calls for a “something more” to find that these particular goods and services are related. *In re Iron Hill Brewery, LLC*, App. No. 86682532, at 5 (TTAB July 28, 2017) (non-precedential). Finally, Applicant cites to a case involving “farming equipment and machinery” on one hand and “processing equipment and machinery” on the other hand, where the only similarity with this case is that it involves “virtually



identical” marks and was heard by the Board. 42 TTABVUE 22-23. At best for Applicant, these cases stand for the proposition that there is no *per se* rule that certain goods and services are related.

Opposer is not relying on a *per se* rule that video games and tabletop games are related. Opposer has submitted into the record, and detailed in its brief, extensive evidence on the relatedness of these goods. In other words, although a “something more” may not be necessary here, Opposer has submitted a number of “something mores” that Applicant simply ignores. Specifically, Opposer submitted evidence that: (a) Opposer’s AUTODUEL games and Applicant’s proposed AUTODUEL game are both *vehicular combat games in a post-apocalyptic setting*; (b) Opposer previously licensed the AUTODUEL mark for precisely the type of game Applicant wishes to create; (c) Opposer has released tabletop games based on computer games, while Applicant recently released a computer game based on a tabletop game; and (d) last year, Opposer’s licensee released through the Steam distribution platform an Ogre® video game based on its Ogre® tabletop game. 40 TTABVUE 22-23. It strains credibility to argue that Opposer has not submitted evidence on this factor, as it does to argue that Opposer has not considered expanding its AUTODUEL mark to video games when it has, in fact, licensed its AUTODUEL mark for video games. In the end, Applicant cites to no evidence to counter the extensive evidence in the record establishing the incredibly high degree of similarity of the goods at issue here.

#### 4. “Downloadable” Is Not a Trade Channel.

Applicant attempts to skirt the Board’s rulings that, without specific limitations on trade channels in the goods identification, the listed goods are considered to travel in all normal and usual channels of trade and methods of distribution, by pointing out that Applicant’s identification includes the word “downloadable.” 42 TTABVUE 23. First, “downloadable” describes the goods, not the trade channels for Applicant’s goods. Next, Applicant’s identification of goods consists of two phrases, and the second—“Interactive video game programs”—is not limited to “downloadable” goods. Finally, the evidence of record demonstrates that both Opposer and Applicant market and sell products in the same trade channels, such as the Apple App Store, the Google Play Store, and Steam. Opposer’s Trial Brief, 40 TTABVUE 24-25. Consumers would not be surprised in the least to see an AUTODUEL video game from Opposer

being sold on Steam, where Opposer already sells its OGRE video game based on its OGRE board game. 25 TTABVUE 11 (¶ 32). Even if the Application did include specific limitations on trade channels to the Apple App Store, the Google Play Store, and Steam, Applicant could not credibly dispute that the trade channels here are highly similar and closely related.

*5. Even If Not Identical, the Respective Marks Are Virtually Identical and Applicant Seeks to Register the Dominant, Distinguishing Portion of Opposer's Mark.*

Applicant argues that the parties' respective marks are not identical because Opposer has used other terms ("America" and "Quarterly"), or other trademarks (the third party "Champions" for a cross-licensed product, and the GURPS mark to reference the game system used) in connection to Opposer's AUTODUEL Mark. The evidence in this case, dating back to Opposer's first use of AUTODUEL in 1982, demonstrates that "AUTODUEL" is the dominant and distinguishing portion of each and every use, and some prior uses, such as Opposer's licensed AUTODUEL video game, displayed the AUTODUEL mark alone. *See* 25 TTABVUE 2-5 (¶¶ 4-8) and exhibits referenced therein. For instance, the AUTODUEL Mark is presented more prominently than the GURPS mark on both the First and Second Editions of the GURPS Autoduel product. *Id.* at 33 (Ex. 7), 49 (Ex. 12). Even if the Board does not consider the marks at issue to be identical, they are nevertheless highly similar or virtually identical. In the end, Applicant's argument is based on semantics, as Applicant's intended appropriation of the common element AUTODUEL dictates that the similarity of the marks factor strongly favors Opposer.

*6. Applicant's Lack of Progress Cannot Turn the Purchase Conditions Factor in its Favor.*

Next, Applicant asserts that Opposer has provided "no evidence whatsoever" that downloadable video games may be purchased on impulse, despite the fact that Opposer provided evidence of the price points of Opposer's own downloadable mobile apps and games. 25 TTABVUE 11 (¶ 31); *see Recot, Inc. v. Becton*, 214 F.3d. 1322, 1329, 54 U.S.P.Q.2d 1894, 1899 (Fed. Cir. 2000) (low priced products subject to impulse purchases). Notably, Applicant has not provided the price point for Applicant's proposed products to dispute Opposer's evidence, and likely cannot do so because Applicant's proposed AUTODUEL game is incredibly early in development.

7. *While Opposer's Sales Have Decreased Over Time, the Record Indicates Opposer's Mark is Widely-Recognized.*

Applicant argues that because Opposer's sales of AUTODUEL-branded products have decreased and because Opposer's products are only sold through one store (Applicant does admit in a footnote elsewhere that the products are sold through two stores), that the AUTODUEL Mark is weak. But Applicant cannot contest that Opposer has sold AUTODUEL games and game supplements for 35 years, that the total sales over those 35 years are extensive, and that a market remains for Opposer's AUTODUEL products. Moreover, as evidenced by the actual confusion that resulted from Applicant's attempt to register AUTODUEL, consumers recognize and identify Opposer as the source for AUTODUEL-branded products.

8. *Applicant Cherry-Picks to Sidestep Evidence of Confusion.*

Applicant is not wrong in its assertion that there is no actual confusion in the traditional sense—after all, Applicant has no product in the marketplace. Yet Applicant's trademark filing resulted in widespread consumer and media confusion, and despite the unconventional circumstances here, Opposer's evidence of actual confusion is both admissible<sup>2</sup> and probative. Instead of addressing the evidence of record that demonstrates actual confusion, Applicant cherry-picks statements from the record and discusses only comments that *question* affiliation, rather than the articles and accompanying comments that explicitly state a belief in sponsorship or association by Opposer or otherwise a connection between Applicant's application and Opposer's AUTODUEL mark. *See* 40 TTABVUE 25-27 and record citations therein.

Because of its cherry-picking, Applicant's reliance on the *Mini Melts* case is misplaced. The *Mini Melts* decision pertains to a witness testifying as to *questions* from "members of his sales and distribution network" about whether the opposer in that case "had agreed to license, sponsor or endorse Applicant's product, or whether Opposer and Applicant were affiliated companies." *Mini Melts, Inc. v. Reckitt*

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<sup>2</sup> Opposer's responses to Applicant's objections to the actual confusion evidence are addressed in Appendix A.

*Benckiser LLC*, 118 U.S.P.Q.2d 1464, 2016 WL 3915987, \*12 (TTAB 2016). The type of evidence offered by Opposer, which includes statements such as “InXile appear to be working on an Autoduel reboot” and “Very excited to see one of my favorite boardgames getting a PC port by a studio that seems competent...” (Opposer’s Trial Brief, 40 TTABVUE 26), evidences consumer mistake and confusion as to source, sponsorship, or affiliation, not a mere question as to affiliation.

Section 2(d) does not require a showing of actual confusion, only likelihood of confusion, and further “[i]n general, evidence of actual confusion is notoriously difficult to come by.” *General Mills Inc. v. Fage Dairy Processing Industry SA*, 100 U.S.P.Q.2d 1584, 1604 (TTAB 2011). Normally, one would not expect any actual confusion evidence to be of record where Applicant has not begun use of the applied-for mark; the fact that it exists here is remarkable. Moreover, the Federal Circuit has said that “[a] showing of actual confusion would of course be highly probative, if not conclusive, of a high likelihood of confusion.” *In re Majestic Distilling Co.*, 65 U.S.P.Q.2d 1201, 1205 (Fed. Cir. 2003).

Admittedly, the actual confusion evidence in the record does not demonstrate universal consumer confusion. As a result, Applicant can point to certain consumers who were not confused. But as detailed in Opposer’s brief, many consumers were confused, and the extent of actual confusion, coupled with the high degree of similarity between Opposer’s goods and Applicant’s proposed goods, further demonstrates the extent of potential confusion, should Applicant be permitted to register the AUTODUEL Mark.

9. *Applicant Declined to Address Mr. Fargo’s Admission of Intent to Benefit from the AUTODUEL Mark.*

In its brief, Applicant declined to directly address the likelihood of confusion factor pertaining to its intent in seeking to register the AUTODUEL mark. In light of this omission, Opposer reiterates that Mr. Fargo, Applicant’s CEO and sole witness, admitted in his deposition that his proposed AUTODUEL game would be “based on” Opposer’s prior AUTODUEL game. 30 TTABVUE 70-71 (Ex. 52 at 183:19-184:8). This fact, along with the other evidence in the record pertaining to Applicant’s knowledge of, not only Opposer’s AUTODUEL mark, but Opposer’s then-recent *enforcement* of its AUTODUEL mark indicate Applicant’s intent to benefit from Opposer’s goodwill in the AUTODUEL mark.

*10. Applicant's Assertion that Confusion is De Minimis is Entirely Without Substance.*

On page 28 of its brief, Applicant cites a string of cases, with no discussion of evidence other than a nod to its prior arguments regarding actual confusion, to argue that an additional factor weighs against a finding of likelihood of confusion. 42 TTABVUE 28. Applicant's argument is cumulative and entirely without substance, and this duplicative "factor" can be disregarded by the Board.

Opposer has shown that there is a likelihood of confusion between the parties' marks given that the marks at issue in this case are identical, the goods and trade channels are highly related, and the mere filing of Applicant's application resulted in actual consumer confusion. Applicant has offered attorney argument, but little-to-no evidence to dispute the likelihood of confusion. For these reasons, and those further detailed in Opposer's Trial Brief, the Board should sustain the opposition under Section 2(d) of the Lanham Act.

B. Even If Applicant Has Subsequently Developed an Intention to Use the AUTODUEL Mark, It Has Not Provided Evidence Sufficient to Establish an Intention at Filing.

Applicant attempts to frame a handful of post-application documents, the earliest from October 22, 2015, as evidencing an earlier *bona fide* intent. Although documents evidencing a *bona fide* intent may not need to be contemporaneous with filing, the non-contemporaneous documents must evidence *bona fide* intent *at filing*, not several months, a year, or in the case of the testimonial declaration of Brian Fargo, nearly three years later. Applicant has provided no documents pertaining to its purported "trademark availability search." See 42 TTABVUE 30-31. Conspicuously absent from Applicant's testimonial declaration is any substantive information regarding Applicant's activities since February 2017. While Applicant has purportedly "research[ed] other games in the market, continu[ed] work on design and design documents, and continu[ed] work on concept and concept art," Applicant provides no documentary evidence of such research or work. Applicant's evidence of purported *bona fide* intent consists of brief correspondence about possibilities (37 TTABVUE Exs. 55-59, 62), and unsolicited proposals/pitches (*id.* at Exs. 60-61). Perhaps Applicant has developed an intention to use the AUTODUEL mark in connection with a video game during the pendency of this proceeding, but its only

intention at filing was merely to reserve the mark to exclude others from registering AUTODUEL, and thus secure the benefit of Opposer's goodwill in its AUTODUEL Mark.

## V. CONCLUSION

Opposer has shown through competent evidence that it has been using the AUTODUEL Mark continuously as a trademark in commerce in connection with tabletop games and game supplements since before Applicant's filing date. Opposer has also shown that there is a likelihood of confusion between the parties' marks given that the marks are identical, the goods are very closely related, the channels of trade overlap, and Applicant's mere application resulted in actual confusion. Any *bona fide* intention Applicant has today to use the AUTODUEL mark was developed after filing. Accordingly, the Board sustain the opposition and reject Applicant's Application Serial No. 86702458 to register AUTODUEL.

Respectfully submitted,

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## **APPENDIX REGARDING EVIDENTIARY OBJECTIONS**

Pursuant to TBMP § 707.03(c), Opposer responds to Applicant's evidentiary objections as follows:

### **A. Objections to Applicant's Objections to the Testimonial Declaration of Phil Reed.**

#### **1. Testimony and Business Records Pertaining to Opposer's Sales**

Opposer has shown through testimony and documents that it began using the trademark AUTODUEL in connection with the promotion and sale of tabletop games and game supplements since well before Applicant's filing date of July 23, 2015, and has used the mark continuously since that time. Opposer presented declaration testimony from its CEO, Phil Reed, and numerous documents evidencing such use. (Testimonial Declaration of Phil Reed, 25 TTABVUE). Mr. Reed has been with Opposer continuously since April 2007, previously worked for Opposer from 1999-2004, and is directly involved in Opposer's product development, sales, and marketing efforts. 25 TTABVUE 1 (¶ 1). He has extensive personal knowledge of Opposer and Opposer's AUTODUEL products, including personal knowledge of sales of Opposer's products as a high-schooler in the 1980s. 25 TTABVUE ¶¶ 4-28; 39 TTABVUE 15:7-15:23. Mr. Reed also testified that Opposer has continued to use the AUTODUEL Mark in connection with tabletop games and game supplements, and expanded that use to other closely related products over time. 25 TTABVUE ¶¶ 6-8, 17-18, 22-28.

Applicant objects to Paragraphs 11-16 and Exhibits 13-15 of the Reed Declaration on the grounds of lack of personal knowledge, lack of foundation/authentication, and hearsay. Mr. Reed has testified that the facts and records set out in his declaration "are based on my personal knowledge, my own research, or on the records and documents of Opposer to which I have access, for which I am a custodian and maintain, or that are maintained at my direction." 25 TTABVUE 1 (¶ 2). Paragraph 11 of the Reed Declaration provides the foundation that Exhibits 13 and 14 are true and correct reports from Opposer's accounting system detailing the sales of AUTODUEL-branded products, by units through July 18, 2016. Paragraphs 12 and 14 further describe the content of these Exhibits. Paragraph 15 provides the foundation

that Exhibit 15 is a true and correct report from Opposer's accounting system detailing the sales of AUTODUEL-branded products in the years 2016 and 2017.

Further, Exhibits 13, 14, and 15 were pulled from accounting systems and compiled from business records at the direction of Mr. Reed (the CEO and declarant), by Opposer's business office led by Daryll Silva, based on records kept by Opposer in the ordinary course of business of regularly conducted activity and maintained at Mr. Reed's direction. *See* 39 TTABVUE 21:2-26:15, 90:15-91:14. These records date back 38 years, have been stored across multiple accounting systems, and retrieval of such records was complicated by a flood that affected Opposer's offices in 2015. *Id.* at 21:2-21:8, 22:2-22:14. Moreover, records after the year 2005 are stored in digital form and had to be pulled from the accounting system to create the reports in a format that could be produced to Applicant and submitted to the Board. *Id.* at 23:22-24:7. Mr. Reed's testimony, in Paragraphs 11, 12, and 14 of his testimonial declaration and in Applicant's cross-examination, provides the necessary authentication and foundation for Exhibits 13, 14, and 15, and they are admissible as business records of regularly conducted activity. Fed. R. Evid. 803(6). Applicant has not in any way called into question the trustworthiness of the challenged testimony and exhibits. Moreover, firsthand knowledge of the information is not necessary, only knowledge about the normal processes of the business. *See generally U.S. v. Salgado*, 250 F.3d 438, 451-452 (6<sup>th</sup> Cir. 2001). Further, to the extent that these exhibits are considered compilations, necessary due to the circumstances of the underlying data, the Board has found that such compilations are admissible. *Kohler Co. v. Baldwin Hardware Corp.*, 82 U.S.P.Q.2d 1100, 1104-05 (TTAB 2007).

Turning to Paragraphs 13 and 16 of the Reed Declaration, these paragraphs do not pertain to challenged Exhibits 13-15. Instead, these two paragraphs provide Mr. Reed's testimony on total sales volume and suggested retail prices of Opposer's AUTODUEL-branded products. Applicant's counsel cross-examined Mr. Reed regarding this testimony, and the cross-examination provides no basis to question that Mr. Reed was competent to testify as to these facts. *Id.* at 42:18-45:25. Again, Mr. Reed is CEO of Opposer, is directly involved in Opposer's product development, sales, and marketing efforts, and testified based on his personal knowledge, his own research, and the records and documents to which he



has access, for which he is custodian and maintains, or that are maintained at his direction. 25 TTABVue 1 (¶¶ 1-2). Applicant has no valid basis to object to the testimony on Paragraphs 13 and 16, and such objections should be overruled.

2. Testimony and Correspondence Pertaining to Licensing Inquiries

Applicant objects Paragraph 21 and Exhibit 17 of the Reed Declaration on the basis that they are hearsay. Mr. Reed's statements that Opposer receives inquiries regarding potentially licensing the AUTODUEL mark, and has an interest in licensing the AUTODUEL mark are not hearsay. During cross-examination, Mr. Reed further testified that another company has reached out to Opposer and discussed the idea of creating an AUTODUEL video game. 39 TTABVue 79:24-80:4. Exhibit 17 consists of an email from a third party to Mr. Reed expressing the third party's state of mind, namely a desire to license the AUTODUEL mark for a video game. As such, the document is an admissible "statement of the declarant's then-existing state of mind (such as motive, intent, or plan)." Fed. R. Evid. 803(3).

3. Testimony Pertaining to Identifying Certain Content of News Articles

Applicant objects to Paragraph 39 of the Reed Declaration on the basis that certain statements are not based on Mr. Reed's personal knowledge and lack foundation. Paragraph 39 contains Mr. Reed's testimony as to how he discovered Applicant's filing to register the AUTODUEL mark and his identification of certain content in news articles. In the challenged statements, Mr. Reed testifies as to the fact that news articles reporting on Applicant's filing of its application to register the AUTODUEL mark contained images of Opposer's products, made assumptions that Applicant would be rebooting Opposer's licensed game, and referenced Opposer and/or Opposer's CAR WARS product. This paragraph contains factual statements that are well within Mr. Reed's personal knowledge, and further describes his state of mind at the time of his discovery. Applicant's objections should be overruled.

**B. Objections to Notice of Reliance on Internet Materials and Notice of Reliance on Discovery Deposition Exhibit 52**

Applicant objects to Exhibits 33-42 of Opposer's Notice of Reliance on Internet Materials (27 TTABVue) and certain pages of Exhibit 52 of Opposer's Notice of Reliance on Discovery Deposition

(30 TTABVUE) on the basis that the documents are hearsay. First, the *Mini Melts* case cited by Applicant pertains to a witness testifying as to queries from “members of his sales and distribution network” about whether the opposer in that case “had agreed to license, sponsor or endorse Applicant’s product, or whether Opposer and Applicant were affiliated companies.” *Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 U.S.P.Q.2d 1464, 2016 WL 3915987, \*12 (TTAB 2016). In the challenged exhibits, Opposer has not provided *testimony* as to statements from others. Instead, Opposer provides: (a) online publications, and (b) consumer comments plainly visible on these online publications. Further, Opposer is also not relying on mere *questions* as to a license, sponsorship, or endorsement. The type of evidence offered by Opposer has been accepted by the Board and courts under the “state of mind” exception, even when offered for the truth of an out-of-court declarant’s assertion. *Armco Inc. v. Armco Burglar Alarm Co., Inc.*, 217 U.S.P.Q. 145, 149, fn.10 (5th Cir. 1982); *Fun-Damental Too Ltd. v. Gemmy Industries Corp.*, 42 U.S.P.Q.2d 1348, 1356 (2d Cir. 1997); *National Rural Electric Cooperative Ass’n v. Suzlon Wind Energy Corp.*, 78 U.S.P.Q.2d 1881, 1887 (TTAB 2006).

Here, the challenged exhibits evidence not mere queries about a connection between Opposer and Applicant, but present sense impressions and statements describing the state of mind of the authors of the respective online publications and the consumers who commented on these online publications. These comments include statements such as “InXile appear to be working on an Autoduel reboot” and “Very excited to see one of my favorite boardgames getting a PC port by a studio that seems competent . . .” Opposer’s Trial Brief, 40 TTABVUE 26. Depending on the particular statement, such statements are either: (a) not being offered to prove the truth of the matter asserted (non-hearsay), or (b) admissible under the present sense impression and state of mind exceptions to the rule against hearsay. Fed. R. Evid. 803(1), (3). For these reasons, Applicant’s objections should be overruled.

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing OPPOSER'S REPLY BRIEF was served via email to Applicant's counsel of record this 27<sup>th</sup> day of September 2018.

/Brandon M. Ress/